(2)

No. 06-1268

In The Supreme Court of the United States

ROBERT A. UNDERWOOD
and FRANK B. AGUON, JR.,

Petitioners,

v.

FELIX P. CAMACHO, MICHAEL CRUZ
AND THE GUAM ELECTION COMMISSION,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Guam

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Whether a Guam statute (3 G.C.A. Section 11114) is inconsistent with the Organic Act of Guam, 48 U.S.C. Section 1422, to the extent that it provides that ballots marked with more candidates than are to be elected ("overvotes") must be excluded from the base for determining what constitutes a majority of votes cast.

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JURISDICTION AND OPINION BELOW

Respondents Felix P. Camacho and Michael Cruz (hereinafter "Respondents") adopt and incorporate Petitioners' statements as to jurisdiction and the opinion below.

ADDITIONAL RELEVANT STATUTORY PROVISION

Respondents adopt and incorporate Petitioners' "Statement of Statutes Involved," at least as far as it goes. However, at least one additional statute should also be mentioned. Title 3 of the Guam Code Annotated, section 11111 provides as follows:

> **11111. Imperfectly Marked Ballots Void.** At any election, any ballot which is not marked as provided by law shall be void; but the ballot shall be preserved. Two (2) or more markings in one (1) voting square or a mark made partly within and partly without a voting square or space does not make a ballot void.

STATEMENT OF THE CASE

Petitioners' Statement of the Case is filled with conclusory assertions that mischaracterize the record. For example, Petitioners stated that they "had every reason to expect that the winning candidates would need to earn a majority of all votes cast in the gubernatorial election, including overvotes, since that was the consistent prior practice in Guam." Pet. 4. For several reasons this statement is misleading; and it borders on misrepresentation.

In fact, no one had *any* reason to expect that overvotes would or could be considered for purposes of the majority-vote requirement because Guam's election law was amended six years before the 2006 election to expressly *exclude* overvotes and other spoiled ballots from being so considered. 4 G.C.A. § 11114(c) (West 2005). Since statutes are generally entitled to the presumption of validity, *Williams v. Zbaraz*, 442 U.S. 1309, 1312 (1979); *Lemon v. Kurtzman*, 411 U.S. 192, 208 (1973), Petitioners' contention that the exclusion of overvotes was somehow unexpected is disingenuous at best.

Indeed, the record reflects that the 2006 General Election Ballot itself expressly informed voters, in three separate places, that overvotes would not be counted and that the Sample Ballot was published in the local newspaper prior to the election.[1] Thus, anyone who simply read the Guam statute, the ballot, or even the newspaper, would have known that overvotes would not be treated as "votes cast."[2]

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[1] The instructions on the Gubernatorial election stated, "MARK ONE (1) OVAL ONLY" and "Vote for one (1) team only." *Official General Election Ballot*, ER 8, *Petitioners Robert A. Underwood and Frank B. Aguon, Jr.'s Excerpts of Record* (Nov. 22, 2006). The consequence of disobeying these instructions was explained on the ballot as follows: "If you mark more than one (1) team, *your vote will not be counted*. If you make a mistake, ask for a new ballot." *Id.* (emphasis added). Prior to the election, the ballot at issue was published. It was undisputed that Petitioners made no objection to the form of the ballot at any time prior to the election.

[2] Any objection as to the form of or instructions contained on the ballot were waived by Petitioners' failure to raise them prior to the election. *See e.g., McKinney v. Superior Court of San Diego County*, 124 Cal. App. 4th 951, 21 Cal. Rptr. 3d 773 (2004); *Lewis v. Cayetano*, 834 P.2d 738, 741 (Hawaii 1992).

Equally misleading are Petitioners various additional assertions that, "the Election Commission always treated overvotes as part of the pool of votes for purposes of applying the majority-vote requirement,"[3] and that the Commission "suddenly"[4] decided to "change[] the rules after the election" in 2006.[5] These and multiple similar characterizations about the Commission are completely unsupported by the record.[6]

To the contrary, as the Commission Counsel's November 9, 2006 Opinion put it, the treatment of overvotes was "a matter of first impression with the GEC." Pet. 29a (Appendix B). The Commission had not previously had occasion to apply Section 11114 in this respect because the treatment of overvotes was simply never material to the outcome of a contested race until 2006. In fact, at no point in Guam's history has there been an instance in which a run-off was ordered based on inclusion of overvotes as "votes cast" in an election.[7]

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[3] Pet. at 6.

[4] Pet. at 6.

[5] Pet. at 4, 6.

[6] Petitioners' only citation to the record in this regard is their reference to a footnote of the Guam Supreme Court's Opinion in the case below. Pet. 6, n. 1 (*citing* footnote 4 of the Opinion, reproduced at Pet. 24a). The Guam Supreme Court made no finding concerning the Election Commission's historic treatment of overvotes. The Court's footnote merely referred to, and rejected, Petitioners' argument that such history should control.

[7] In the close 1982 Gubernatorial election, the treatment of overvotes could have affected the outcome of the Gubernatorial election. However, the second-place candidate, Governor Calvo, declined to ask for a run-off and the matter was never addressed either by the Guam Election Commission or the Courts.

It is true that overvotes have always been tabulated as part of the final result. Indeed, not only overvotes but also *undervotes* were tabulated for each office up for vote in the 2006 General Election, just as they have always been, for the purpose of accounting for and reconciling all of the ballots.[8] But counting ballots is not the same thing as determining whether particular ballots count. The Election Commission did not "change the rules" in 2006. In fact, there were no "rules" to change. The treatment of overvotes is governed by statute. The Commission did only what it was legally bound to do – follow the existing law as written. As the Guam Supreme Court noted, agency practice cannot change the law. Pet. 24a, n. 4.

Petitioners' inflammatory language ("suddenly changed the rules") and their observation that overvotes can "be the product of fraud . . . " (Pet. 5), tend to convey the false impression that Election Commission personnel or others might have engaged in misconduct or that there was some other sort of irregularity that affected the outcome of the election or the Commission's treatment of overvotes. In fact, the record is devoid of any such allegation; and neither Petitioners nor anyone else filed an election protest alleging any form of misconduct. Accordingly, Petitioners' subtle suggestions of irregularities should be disregarded.

In any event, contrary to Petitioners' suggestion, the issue here is not Commission practice, it is whether

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[8] *See* ER 2-7, *Petitioners Robert A. Underwood and Frank B. Aguon, Jr.'s Excerpts of Record* (Nov. 22, 2006) (Showing results from 1990-2006).

Section 11114's exclusion of overvotes is somehow inconsistent with the Organic Act.[9] As we shall see, clearly it is not.

SUMMARY OF ARGUMENT

Petitioners' principal legal argument is simply untenable. No "unsettled" legal point is at issue in this case because no state or federal court has ever held that overvotes should be considered "votes cast" for purposes of meeting the majority-vote requirement in a candidate election. To the contrary, courts addressing the issue have uniformly held that overvotes are invalid votes and thus should not be counted for that purpose.

The Guam Supreme Court's ruling in the case below is fully consistent with the authorities; and it is equally consistent with this Court's jurisprudence on voting in general and Guam Gubernatorial elections in particular. The petition for *certiorari* should be denied because Petitioners have failed to show that there is any unsettled

[9] Although the Guam Supreme Court apparently did not deem it necessary to address the matter, Respondents also opposed issuance of a writ of *mandamus* on the ground that Congress, in enacting the Organic Act, had not preempted the Guam Legislature from passing electoral statutes such as Section 11114. *Real Parties' Answer to Pet. for Writ of Mandamus* (Nov. 27, 2006) at pp. 44-46. Specifically, Respondents noted that Congress had not explicitly stated any intent to preempt local law, that the Organic Act's basic provisions for elections left plenty of room for local legislation supplementing it, and that Section 11114, was complementary to, and not inconsistent with, those provisions. *Id., citing, inter alia, City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424, 440 (2002); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); and *Wisconsin Public Intervener v. Mortier*, 501 U.S. 597, 605 (1991).

issue of law, conflict between the lower courts, or important federal issue sufficient to justify such review.

REASONS FOR DENYING THE PETITION

"[A] petition for writ of *certiorari* will be granted only for compelling reasons." Sup. Ct. R. 10. This case does not meet any of the standards for *certiorari*. The Guam Supreme Court's ruling below was consistent with the overwhelming weight of authority from state and federal courts around the country that have addressed similar issues. The Guam Supreme Court's Opinion did not decide an important question of federal law that has not been but should be settled by this Court; it merely made a routine application of the authorities and precedents from this Court in upholding a Guam statute based on its plain terms. There is no split between the lower courts on any important issue of law. Moreover, the Court did not decide an important federal question in a way that conflicts with the decision of another state court, a federal court of appeals or this Court.

This Court recently acknowledged that decisions of the Supreme Court of Guam are instructive and are entitled to respect when they indicate how statutory issues, including the Organic Act, apply to matters of local concern. Petitioners merely argue that the case below was wrongly decided; and they speculate that the issue could arise and be adjudicated again in the future. What Petitioners have failed to do is explain, in light of this Court's standards for granting *certiorari*, why this Court should undertake to review the matter.

I.

THE GUAM SUPREME COURT'S RULING IS CONSISTENT WITH THE OVERWHELMING WEIGHT OF AUTHORITY ON POINT

This case arose based on conflicting interpretations of the term "votes cast" as used in the Organic Act of Guam. This Court's recent opinion in *Limtiaco v. Camacho*, 549 U.S. ___, No. 06-116 (slip op., March 27, 2007), offers guidance on how such conflicting interpretations are to be resolved.

In *Limtiaco*, the Court looked first to the plain language of the provision in question and then to dictionary and judicial interpretations of that language. *Id.*, at pp. 5-7. As part of that process, the Court looked to a leading treatise on municipal corporations to determine the majority approach to the taxation problem at issue. *Id.*, at pp. 7-8, *citing* 15 E. McQuillin, Law of Municipal Corporations § 41:7, p. 422 (3d ed. rev. 2005). The Court then observed that, "[s]tates that depart from the majority approach use clear language to do so." *Id.*, at p. 7. Because Congress had not used such language in the Organic Act provision at hand, the Court concluded that no departure from the majority approach was warranted.

The Court's analysis in *Limtiaco* applies with equal force to the instant case; and its application leads to the same conclusion. Here, the vast majority of jurisdictions that have addressed the matter have concluded that overvotes or spoiled ballots are not to be considered for purposes of a majority-vote requirement; and "[s]tates that depart from the majority approach use clear language to do so."

A. No State or Federal Court Case Supports Petitioners' Argument

Fundamentally, an election is an expression of "choice of candidates." *United States v. Classic*, 313 U.S. 299, 318 (1941). "[V]oting is the affirmative act of marking the ballot and depositing it in the ballot box in conformity with the election laws." *State ex rel. Cashmore v. Anderson,* 160 Mont. 175, 500 P.2d 921, 929 (1972), *cert. denied,* 410 U.S. 931 (1973). Those who "overvote" simply fail to make an expression of "choice of candidates." Petitioners have still failed to come forward with a single case in which the term "votes cast" was held to include invalid or spoiled votes in a candidate race. Thus, they have failed to make even a threshold showing that their interpretation of the phrase "votes cast" is tenable.

In fact, federal and state court opinions construing statutes with the same or similar language at bar have uniformly concluded that overvotes must be excluded from the determination of whether a candidate has received a majority of the votes cast. For example, a 2004 decision of the Fifth Circuit Court of Appeals explains the folly of counting overvotes (as well as undervotes) for purposes of assigning percentages to candidates in a race:

> Neither over-votes nor under-votes "count" toward determining victory in a race because they represent, respectively, either a "spoiled ballot" or an uncast ballot for that particular race. The ballot remains valid, of course, for those races and only those races in which it was properly marked. But **to use such ballots in the denominator for calculating the percentage of the vote received in a given race, when the votes from those ballots would not have affected the**

> **race, is simply incorrect and results in skewed and inaccurate vote percentages.**

Rodriguez v. Bexar County, Tex., 385 F.3d 853, 861 (5th Cir. 2004) (emphasis added).

Similar rulings excluding overvotes were made in the following cases: *Hornsby v. Hilliard*, 189 So.2d 361, 363 (Fla. 1966) (holding that blank, spoiled and irregular ballots in a school-district millage election were not an expression of a choice and could not be considered in determining whether a specifically proposed millage had received a majority of all votes cast in election); *Wooley v. Sterrett*, 387 S.W.2d 734, 740 (Tex. Civ. App. 1965) (holding that " . . . ballots that do not legally register the will of the voter should not be included in determining a majority."); *Waters v. Gnemi*, 907 So.2d 307, 311 (Miss. 2005) (holding that " . . . a voter cannot legally vote for more than one candidate in the same election, and thus, in the case of an overvote, that ballot, while not totally void as to other elections appearing on the ballot, is not counted for that particular election."); *Stembridge v. Newton,* 99 S.E.2d 133, 134 (Ga. 1957) ("Unintelligible, illegal, and blank ballots should not be counted in computing the number of votes cast in an election, since a ballot cannot become a valid vote unless it conforms to the requirements of law. Therefore, an undecipherable ballot is a mere nullity . . . "); *Port of Palm Beach Dist. v. State*, 22 So.2d 581, 583 (Fla. 1945) ("We think 'votes cast' at an election are choices expressed at that election. There is abundant authority to the effect that ballots registering no preference should be disregarded in determining the result of an election.").

A leading legal treatise sums up the rule commendably: " . . . [B]allots which have been cast, but which because of

their marking or other reason cannot be counted as votes, must be excluded from the aggregate number of votes and not be considered in determining whether the proposition has received the requisite majority unless the statute pursuant to which the proposition is submitted is so worded as to require the consideration of all ballots cast, whether valid or invalid . . . " 29 C.J.S. *Elections* § 397 (1965) at p. 675 (internal citations omitted). *See also* 26 AM.JUR.2D, *Elections* § 379 (2004), at p. 189 ("Blank, illegal, and unintelligible ballots should be rejected in computing the number of votes.").

Likewise, a 1988 Hawaii Attorney General's Opinion concluded that overvotes should *not* be considered for purposes of a county prosecuting-attorney election statute, virtually identical to the provision *sub judice*, requiring the winning candidate to receive "a majority of votes cast."[10] OPPS. ATTY. GEN. HAWAII, OPINION NO. 88-5, 1988 WL 247835 (Sept. 15, 1988).

These authorities and rulings clearly set forth the majority rule that overvotes or spoiled ballots are not to be considered absent express statutory language to the contrary. Adding to the significance of these and other similar rulings is the fact that Petitioners have failed to come forward with any reported contrary rulings in which a court has proceeded to deem overvotes to be votes cast for purposes of a majority-vote requirement in a candidate race.

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[10] The provision, Article VIII, section 8-102 of the Revised Charter of the City and County of Honolulu, as amended in 1986, provides in part: "The candidate receiving a majority of votes cast for the office of the prosecuting attorney shall be deemed elected." OPPS. ATTY. GEN. HAWAII, OPINION NO. 88-5 (Sept. 15, 1988) (emphasis added).

B. Petitioners' Reliance Upon Referendum Statutes is Misplaced

Unable to find cases or authorities supporting their interpretation, Petitioners instead pointed to certain statutes or compacts applied to former territories in which Congress referred to "the majority of legal votes cast," "the majority of valid votes cast," or used similar language. Pet. 5, 16. Petitioners posited that if Congress had intended for "votes cast" to include only *valid* votes it could have used such qualifying language. *Id.* For three reasons Petitioners' argument is less than persuasive.

First, Petitioners mixed proverbial apples and oranges. The provisions Petitioners cited pertain solely to referendums or plebiscites. None of those statutes involved the election of candidates. This is a distinction with a difference. In a similar context this Court expressly stated that "referendums are exceptions to the normal legislative process" and "are not a plausible model for the election of officials." *Gutierrez v. Ada*, 528 U.S. 250, 256 (2000). Accordingly, the Court in *Gutierrez* declined to look to cases involving referendums as persuasive because unlike selecting a governor, "passage of a referendum is not itself essential to the running of the government." *Id.* Petitioners have failed to explain any principled reason why this Court should find referendum cases or statutes any more persuasive in the current context.

Second, even if referendums were an appropriate model, the overwhelming majority rule in referendum cases, as reflected in some of the authorities cited above, is that overvotes should be excluded "unless the statute pursuant to which the proposition is submitted is so worded as to require the consideration of all ballots cast,

whether valid or invalid . . . " 29 C.J.S. *Elections* § 397. Thus, courts presume that "votes cast" means *valid* or *legal* votes cast, unless the controlling statute states otherwise. The statute *sub judice* does not state otherwise.

Third, it is not difficult to show how a statute – any statute – might have been made clearer with the benefit of ingenuity and hindsight. However, two can play at that game. If, as Petitioners maintain, Congress had intended the term "votes cast" to encompass spoiled ballots and invalid votes it could and should have used the terms "ballots cast," or "whether valid or invalid," as some statutes have, and as the authorities generally require in order to accomplish such a result. *See Hawaii State AFL-CIO v. Yoshina*, 935 P.2d 89, 98 (Hawaii 1997) (holding that "a majority of ballots cast upon such a question" includes blank ballots and overvotes); *State v. Clausen*, 130 P. 479, 479 (Wash. 1913) (observing that " . . . the decided weight of authority is to the effect that ballots improperly cast or rejected because of illegality or unintelligibility cannot be counted in determining the total vote cast."). Thus, Petitioners' comparison of unrelated and extraordinary referendum statutes falls well short of lending support to their unprecedented interpretation.

C. Petitioners Failed to Show any Congressional Intent to Deviate from the Well-Settled Interpretations of "Votes Cast"

"As always, we begin with the text of the statute." *Limtiaco*, at p. 5. This Court will assume that the legislative purpose of a statute is expressed by the ordinary meaning of the words used in it. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). The Court also presumes

that Congress used statutory terms based on their judicially-established meaning, in the absence of a statement to the contrary. *United States v. Merriam*, 263 U.S. 179, 187 (1923). As we have seen, the authorities leave no doubt that the term "votes cast" means *valid* votes cast, and excludes spoiled ballots.

Petitioners proclaimed that the plain wording of the Organic Act provision at issue supports their proposed treatment of overvotes. Pet. 16. Yet Petitioners carefully avoided judicial interpretations of the terms "vote" or "votes cast." Instead, they undertook to interpret words not even found in the Organic Act. Specifically, Petitioners relied on *Black's Law Dictionary*, and no other authority, for the dubious proposition that a "spoiled ballot" is a "vote." Pet. 16. This novel attempt at statutory construction falls rather wide of the mark. Petitioners cannot avoid the weight of authority construing "votes cast" to exclude overvotes by focusing on another term not even used in the statute.

Black's Law Dictionary does not define the term "votes cast," but it does define "vote" to mean, "Suffrage; the expression of one's will, preference or choice . . . " *Id.* (6th ed. 1990). This common-sense definition is completely consistent with the Guam Supreme Court's holding that, " . . . only expressions of will or choice, or final selections of an office holder, may be properly included in the total number of votes cast." Pet. 25a. Petitioners fail to point to any authority that supports the proposition that an overvote or spoiled ballot amounts to an expression of one's will, preference or choice.

Instead of seeking to define terms actually used in the Organic Act, Petitioners engaged in a discussion about the

relevant Congressional debate in an apparent attempt to show that the legislative history of the Act favors a construction contrary to the Guam Supreme Court's ruling. Nothing set forth by Petitioners, however, manifests any intent by Congress to depart from the well-settled judicial interpretation of the terms "vote" or "votes cast" to exclude spoiled or invalid ballots. As this Court has phrased the matter in a similar context, the "fragments of legislative history cited by [Petitioners], regardless of how liberally they are construed, do not amount to a clearly-expressed legislative intent contrary to the plain language of the statute." *American Tobacco*, 456 U.S. at 75; *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Where, as here, "the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . . '[there is no occasion] to examine the additional considerations of "policy" . . . that may have influenced the lawmakers in their formulation of the statute.'" *Rodriguez v. U.S.*, 480 U.S. 522, 526 (1987); *Aaron v. SEC,* 446 U.S. 680, 695 (1980) (*quoting Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 214, n. 33 (1976)).

Moreover, Petitioners failed to recognize that Congress has effectively ratified the command of Guam statutory law, that " . . . any ballot which is not marked as provided by law shall be void . . . " 3 G.C.A. § 11111. That provision of Guam election law was on the books at the time when the Organic Act still provided that Congress' failure to vacate Guam statutes amounted to Congressional approval of them. *See Ramsey v. Chaco*, 549 F.2d 1335, 1338 (9th Cir. 1977) ("Prior to amendment in 1968, . . . the Organic Act also provided that . . . unless Congress acted to annul the law within one year, it was deemed to

have congressional approval."); *citing* Guam Organic Act § 19, ch. 512, § 19, 64 Stat. 389 (1950), as amended 48 U.S.C. § 1423i. By failing to vacate Section 11111, Congress has endorsed Guam's treatment of "imperfect ballots" as "void."

II.

THE GUAM SUPREME COURT'S RULING IS CONSISTENT WITH THIS COURT'S RULINGS

The Guam Supreme Court's ruling that overvotes must be excluded from the "votes cast" calculation is fully consistent with the holding of this Court in *Gutierrez v. Ada*. In *Gutierrez*, the Court rejected the notion that the Organic Act's use of the term "votes cast" meant "ballots cast." But that was hardly the end of the Court's analysis. After carefully examining the language and legislative history of the provision, the Court also observed that "it would not make any apparent sense" to require a run-off "when those who expressed any preference among candidates had already given a majority to one of them." *Id.* at 256-257. The same reasoning explains why overvotes should not be included within the phrase "votes cast," because voters who "overvoted" – like those who undervoted – simply cannot be categorized as "those who expressed any preference among candidates."

That conclusion is consistent with this Court's prior ruling that to cast a vote is to make a "final choice of an officer." *Newberry v. United States*, 256 U.S. 232, 250 (1921). A voter makes no such final choice when he or she votes for both candidates when instructed to vote for just one. Stated differently, voters who in this instance darkened ovals for both the Camacho and Underwood teams in

the Guam General Election simply did not make the required "expression ... of their choice of candidates." *U.S. v. Classic*, 313 U.S. 299, 318 (1941). Thus, "it would not make any apparent sense" to count *overvotes* in calculating a majority any more than it would to count undervotes. In each case, the voter has failed to record a valid vote for any particular candidate.

In *Gutierrez*, this Court also stated that allowing those not casting a vote for a particular candidate to figure into the majority equation would "impute to Congress a strange preference for making it hard to select a governor." *Id.* at 256. The Court further observed that, "[o]n respondents' reading, the statute could require a runoff (as it would in this case) even though one slate already had a majority of all those who cared to make any choice among gubernatorial candidates." *Id.* at 256. The identical concerns apply to the counting of *overvotes*. To hold otherwise would "impute to Congress a strange preference for making it hard to select a governor" because such a holding would effectively allow spoiled votes to frustrate the will of those who made a single, valid choice.[11]

Thus, while this Court in *Gutierrez* did not expressly address the subject of overvotes, it left no doubt that it makes no sense to take into account the actions of those

[11] Under Petitioners' theory, a group of disgruntled voters could attempt to frustrate the will of those making a choice for Governor by intentionally casting overvotes in each General Election and each subsequent runoff. The Organic Act requires a majority "in any election." Thus, if overvotes were accorded the dignity of "votes cast" one can envision *seriatim* runoffs, in which a determined few systematically impede the vast majority from orderly electing a governor.

who failed to express a preference among candidates.[12] Petitioners' argument that overvotes should be treated as "votes cast" is not only unsupported by the authorities, it is fundamentally inconsistent with this Court's reasoning and ruling in *Gutierrez*.

In contrast, the Guam Supreme Court's ruling in the case below is fully consistent not only with *Gutierrez*, but also with earlier rulings from this Court concerning the nature and treatment of votes in various contexts. In addressing the issues, the Guam Supreme Court found "ample guidance in cases from the United States Supreme Court." *Id.* at ¶ 23. Indeed, the foundation of the Guam court's Opinion was its historical analysis of this Court's election jurisprudence dating from *County of Cass v. Johnson*, 95 U.S. 360 (1877), to *Bush v. Gore*, 531 U.S. 98 (2000).

Petitioners claim that the Guam Supreme Court (as well as the Guam Legislature and the Election Commission) "misread" *Gutierrez*. Yet Petitioners stop well short of furnishing any contrary reading of *Gutierrez* that actually supports their theory. Instead they merely state that *Gutierrez* is "silent" on the matter. Pet. 14. In fact, Petitioners do not claim that any other decision of this Court actually endorses their interpretation of "votes cast." Accordingly, they do not and cannot claim, as a basis for

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[12] "Overvotes" were not at issue in the *Gutierrez* case because, overvotes were immaterial to the outcome of the 1998 election and also because Guam had not yet enacted the 2000 amendments expressly prohibiting the counting of overvotes as "votes cast." Certainly, nothing in the Court's Opinion could possibly be construed as holding such legislation Inorganic for the simple reason that the precise statute in question did not yet exist.

granting *certiorari*, that the Guam Supreme Court "has decided an important federal question in a way that conflicts with relevant decisions of this Court." *See* Sup. Ct. R. 10(c).

Petitioners faulted the Guam Supreme Court's Opinion on the ground that it failed to address the matter of write-in votes, noting that "all 668 write-in votes in the 2006 gubernatorial election were included in the vote base, regardless of their content." Pet. 19. Yet Petitioners neglected to mention that they never raised the treatment of write-in votes as an issue in the case below. The reason Petitioners never raised the issue is mathematical. Even if all of those write-in ballots were to be examined and somehow resolved to instead be Underwood-Aguon votes, the Camacho-Cruz team would still have enjoyed a majority of some 192 votes.[13] More importantly, since all of those 668 ballots were already included in the base of "votes cast," invalidation of any of those ballots for any reason would only have increased the percentages attributable to the candidate-teams that did appear on the ballot, thereby increasing the Camacho-Cruz majority.

[13] Not all ballots containing write-in selections were designated "write-in votes." Ballots expressing a write-in selection as well as a selection for one or more of the listed candidates were automatically treated as "overvotes," and comprised part of the 504 overvotes recorded by the Commission.

III.

THE RISK OF POSSIBLE FUTURE ELECTION DISPUTES DOES NOT SUPPORT GRANTING *CERTIORARI*

A. Speculation About Future Challenges does Not Justify Granting *Certiorari*

Petitioners assert that this case presents a "... significant and recurring question that this Court should resolve." Pet. 10. Yet nothing but speculation supports such a contention – certainly history does not. Overvotes were "irrelevant" to the dispute over the 1998 Guam election. Pet. 16a. In fact, this litigation marks the first time that anyone has actually brought suit over the treatment of overvotes under either the Guam or Virgin Islands Organic Acts. The most Petitioners can muster in this regard is the assertion that the overvote issue was "nearly" implicated after the 2006 Virgin Islands Governor's race. Pet. 11. That an issue "nearly" came up hardly serves as persuasive evidence of any compelling need to address it now. Indeed, the fact that overvotes were *not* pivotal despite the closeness of the 2006 Virgin Islands contest only serves to illustrate just how infrequently the treatment of overvotes makes any material difference in the electoral outcome.

It is admittedly possible that an aggrieved candidate could seek to litigate this issue again at some point. However, such an eventuality is far less likely than Petitioners would have the Court suppose. First, the matter simply cannot arise again until 2010 at the earliest – for that is the next time that the voters of Guam and the Virgin Islands will go to the polls to elect a governor. Second, the issue cannot arise unless and until there is

another Gubernatorial race in which margin of victory is sufficiently narrow that the outcome depends solely on treatment of overvotes. History shows that to be a rare occurrence. Third, even if such an event were to come to pass, at some uncertain point in the future, there would be no lawsuit, and thus no controversy, unless an aggrieved party should find it worthwhile to file one. It could well be that a candidate on the short end of such an electoral outcome – persuaded by the clarity of the Guam Supreme Court's ruling or weary of waging another campaign after losing the first time around – would deem it preferable to concede and move on.

This Court sometimes grants *certiorari* in order to address conflicting rulings made by the lower courts. That is the reason this Court undertook to review the lower court's ruling in *Gutierrez*. *Id.*, 528 U.S. at 254. As we have seen, however, in this case there are no conflicting rulings. Petitioners argue that one day there might be a conflicting ruling. If and when that day comes, *certiorari* might be appropriate. The mere possibility of a future dispute and future inconsistent ruling, however, hardly justifies the extraordinary step of granting *certiorari* at the present time.

Petitioners spoke about the supposed need for guidance from this Court in order to avoid "another electoral crisis." Pet. 15. Yet there is nothing in the record to suggest that any "crisis" ensued in the aftermath of the 2006 Gubernatorial Election. There is likewise no reason to suppose that any future electoral challenge could not be effectively managed by the local and federal courts sitting in Guam. In the local court system, such a suit would be bound for summary dismissal because the Supreme Court of Guam has definitively ruled on this subject. Any suit

maintained in the federal system would be handled in an expedited manner pursuant to existing rules of procedure which, in the face of similar and even greater challenges, have proven quite sufficient to enable courts to avoid crises and to safeguard the rights of the parties.

B. The Guam Supreme Court's Ruling Provides Guidance and is Entitled to Due Deference

As further purported justification for granting *certiorari*, Petitioners maintain that the Guam Supreme Court's ruling in the case below would not be binding in the event a future challenge were to be brought in the federal court system. While it is true that Guam Supreme Court rulings are not binding as to Organic Act issues, the federal courts have nevertheless accorded due deference to such rulings in view of the unique role the Guam high court plays in shaping interpretations of the Organic Act. *See Guam v. Guerrero*, 290 F.3d 1210, 1213-1214 (9th Cir. 2002); *Gutierrez v. Pangelinan*, 276 F.3d 539, 547 (9th Cir. 2002) ("The Congressional promise of independent institutions of government would be an empty one if we did not recognize the importance of the Guam Supreme Court's role in shaping the interpretation and application of the Organic Act.").

In *Limtiaco*, this Court recognized that, " . . . decisions of the Supreme Court of Guam, as with other territorial courts, are instructive and are entitled to respect when they indicate how statutory issues, including the Organic Act, apply to matters of local concern." *Id.*, at p. 8. In making this observation, the Court took note of its historic deference to territorial courts over matters of purely local concern. *Id., citing Pernell v. Southall Realty*, 416 U.S.

363, 366 (1974). The Court nevertheless reversed the Guam Supreme Court ruling at issue in *Limtiaco* because it reasoned that the Court is bound to construe to Organic Act "according to its terms" and, moreover, because the issue then before the Court was not purely of local concern. *Id.* However, these considerations do not militate in favor of reviewing the Guam Supreme Court's ruling in the instant case.

First, as we have seen, the Guam Supreme Court clearly interpreted the Organic Act "according to its terms." Only a strained interpretation of the statutory language would support the view of overvotes being advanced by Petitioners in this case.

Second, determining whether or not overvotes are to be considered in Guam gubernatorial elections *is* purely a matter of local concern. Guam has, by statute, adopted rules and procedures for conducting its elections, one of which governs the treatment of overvotes. 3 G.C.A. § 11114(c). In cases involving legislation or rules adopted in the District of Columbia, this Court has generally deferred to the rulings of the courts of the District, deeming such matters to be purely of local concern. As stated in *Pernell*, "[t]his Court has long expressed its reluctance to review decisions of the courts of the District involving matters of peculiarly local concern, absent a constitutional claim or a problem of general federal law of nationwide application." *Pernell*, 416 U.S. at 366-367.

Thus, in *Griffin v. United States*, 336 U.S. 704, 717-718 (1949), the Court held that "formulation of rules of evidence for the District of Columbia is a matter purely of local law to be determined – in the absence of specific Congressional legislation – by the highest appellate court

for the District." Likewise, in *Fisher v. United States*, 328 U.S. 463, 476 (1946), the Court held that "[m]atters relating to law enforcement in the District are entrusted to the courts of the District. Our policy is not to interfere with the local rules of law which they fashion, save in exceptional situations where egregious error has been committed."

The Guam Organic Act does not even begin to direct Guam's officials on the myriad of details inherent in the endeavor of conducting an election or counting ballots. On Guam, as everywhere else in the nation, such details are matters of local governance, left to the states and territories even when federal offices are included on the ballot. *See, e.g., Bush v. Gore*, 531 U.S. at 116. Here, the Guam Legislature has fashioned and the Guam Supreme Court has upheld a rule of law governing the treatment of overvotes that is not inconsistent with any specific term of the Organic Act or any Constitutional provision. It is just the sort of "purely local" matter for which deference is due.

Unlike in *Limtiaco*, where the Court observed that, "[t]he debt-limitation provision protects both Guamanians and the United States from the potential consequences of territorial insolvency[,]" the treatment of overvotes in Guam has only the most remote and attenuated connection to either territorial solvency or any other conceivable matter of nationwide application. Whether or not Guam gubernatorial candidates must contest a run-off election is hardly a matter of national concern. Thus, while the Organic Act is concededly a federal statute, the Guam Supreme Court's ruling on the overvotes issue is nevertheless "instructive" and would be "entitled to respect" by a federal court that might one day be called upon to revisit the issue.

Petitioners overstated the matter when they complained that the Guam Supreme Court's ruling leaves the matter "unsettled." The matter is, at least for now, settled; and the Petitioners have furnished the Court no principled rationale justifying any reexamination of the matter at this time.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition should be denied.

Dated this 13th day of April, 2007.

Respectfully submitted,

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